Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-69-95
LAMIN PCA, ABU MANSOR JCA AND AHMAD FAIRUZ J
24 NOVEMBER 1995

***Civil Procedure** — Jurisdiction — Arbitration clause — Provision in agreement that dispute arising from implementation of agreement to be referred to named arbitrator — Arbitrator's decision to be final and binding — Whether dispute within meaning of agreement — Whether arbitrator had jurisdiction to adjudicate matter*

The appellants and the respondent, who were brothers, were also the shareholders of 13 companies. A dispute arose between the parties, and consequently, a compromise agreement ('the agreement') was entered between them. Pursuant to cl 4.2 of the agreement, the respondent was to select the companies of his choice from the list of 13 companies, and he would then exchange shares with the appellants. Clause 4.2 of the agreement also made provision for any dispute relating thereto to be resolved pursuant to cl 4.5 of the agreement. Clause 4.5 provided that any dispute under cl 4 in any manner whatsoever should be referred to a named arbitrator whose decision was to be final and binding. Later, a disagreement arose relating to the choice of companies, and the appellants referred the matter to the arbitrator named in the agreement. The respondent objected, contending that there was no dispute within the meaning of the agreement to be referred to the arbitrator, and that the arbitrator had no jurisdiction to adjudicate on the matter. However, the arbitrator who was of the view that he had jurisdiction to adjudicate dismissed the objection. He went on to award in favour of the appellants. Before the High Court, the respondent's application to set aside the arbitrator's award was allowed. The judge held that the arbitrator had erred in the interpretation of cl 4.2. The appellants appealed to the Court of Appeal.

Held, allowing the appeal:

(1) Giving a clear meaning to cl 4.2 and reading it with cl 4.5, it was beyond doubt that there existed a dispute requiring a resolution in accordance with cl 4.5 (see p 188H); *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 followed.

(2) In failing to apply for a stay of the arbitration, or to submit a case of absence of jurisdiction before the judge, the respondent had failed to discharge the burden of showing that the matter should not have been referred to arbitration (see pp 188I–189A).

(3) The judge had erred in failing to decide on the question of whether the arbitrator had jurisdiction (see p 189E).

(4) In the absence of any error of law by the arbitrator on the face of the award made by him, the judge had erred in usurping the

function of the arbitrator. The award was one made by an arbitrator whose appointment was agreed to by both parties to the agreement and whose decision on a dispute arising under cl 4 was to be final and binding. There was a dispute and one party had brought it before the arbitrator. The other party should not be allowed to renege on it but should be bound by the arbitrator's decision as he had agreed to be so bound (see pp 189I and 190A–C).

[Bahasa Malaysia summary

Perayu-perayu dan penentang, yang merupakan adik-beradik, juga merupakan pemegang syer dalam 13 syarikat. Suatu pertikaian kemudiannya tercetus antara pihak-pihak tersebut, dan akibatnya, suatu persetujuan kompromi ('persetujuan tersebut') telah diikat. Mengikut fasal 4.2 persetujuan tersebut, penentang akan memilih syarikat pilihannya daripada senarai 13 syarikat tersebut, dan beliau kemudiannya akan menukar syer dengan perayu-perayu. Fasal 4.2 juga memperuntukkan bahawa sebarang pertikaian yang timbul akan diselesaikan mengikut fasal 4.5 persetujuan tersebut. Fasal 4.5 menyatakan bahawa sebarang pertikaian di bawah fasal 4 yang timbul harus dirujukkan kepada seorang penimbangtara yang dinamakan, dan keputusannya adalah muktamad dan mengikat. Walau bagaimanapun, satu percanggahan telah timbul berkaitan dengan pilihan syarikat, dan perayu-perayu telah merujukkan perkara itu kepada penimbangtara yang dinamakan dalam persetujuan tersebut. Penentang membantah, dan menghujahkan bahawa tidak terdapat pertikaian dalam maksud persetujuan tersebut untuk dirujukkan kepada penimbangtara, dan bahawa penimbangtara tidak ada bidang kuasa untuk membicarakan perkara itu. Walau bagaimanapun, penimbangtara yang berpendapat bahawa beliau mempunyai bidang kuasa untuk membicara menolak bantahan tersebut dan telah membuat award yang memihak kepada perayu-perayu. Di Mahkamah Tinggi, permohonan penentang untuk mengenepikan award penimbangtara telah dibenarkan. Hakim tersebut telah memutuskan bahawa penimbangtara telah membuat kesilapan dalam pentafsiran fasal 4.2. Perayu-perayu telah membuat rayuan kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Selepas memberikan suatu makna yang jelas kepada fasal 4.2, dan selepas membacanya bersama fasal 4.5, adalah jelas bahawa suatu pertikaian yang memerlukan penyelesaian mengikut fasal 4.5 wujud (lihat ms 188H) *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 diikut.

(2) Oleh kerana penentang gagal untuk memohon untuk penggantungan timbangtara, atau untuk mengemukakan ketiadaan bidang kuasa kepada hakim, penentang telah gagal membuktikan bahawa perkara itu tidak harus dirujukkan kepada timbangtara (lihat ms 188I dan 189A).

(3) Hakim telah membuat kesilapan kerana gagal menentukan soalan sama ada penimbangtara mempunyai bidang kuasa (lihat ms 189E). A

(4) Oleh kerana tidak terdapat kesilapan undang-undang pada zahir award yang dibuat oleh penimbangtara, hakim tersebut telah membuat kesilapan dalam merampas fungsi penimbangtara. Award itu dibuat oleh seorang penimbangtara yang perlantikannya telah dipersetujui oleh kedua-dua pihak dan yang keputusannya, mengenai pertikaian yang timbul di bawah fasal 4 adalah muktamad dan mengikat. Suatu pertikaian telah timbul di sini, dan satu pihak telah mengemukakannya kepada penimbangtara. Pihak yang satu lagi tidak patut dibenarkan untuk memungkirinya, tetapi ia seharusnya terikat dengan keputusan penimbangtara seperti yang ia telah berjanji (lihat ms 189I dan 190A–C).] B C

[*Editorial Note*: The respondent had applied for leave to appeal to the Federal Court vide Civil Application No 08–85–1995. The application, which was heard on 15 & 16 January 1996, was dismissed in so far as the appeal against the award of companies to the appellants was concerned.] D

Notes E

For cases on arbitration clauses, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2099–2100.

Cases referred to

AG for Manitoba v Kelly & Ors [1922] 1 AC 268 F

Bank Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Law Reports 44

Gujarat State Co-operative Land Development Ltd v PR Mankad & Anor AIR 1979 SC 1203

Pearl Hill Sdn Bhd v Trikkon Construction Sdn Bhd [1984] 2 CLJ 191

Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309 G

Produce Brokers Co v Olympia Oil and Cake Co [1916] 1 AC 314

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97

Thorburn v Barnes (1867) Law Reports 2 CP 384 H

Legislation referred to

Arbitration Act, 1952 s 6

Appeal from: Originating Motion No R1-25-3-1995 (High Court, Kuala Lumpur) I

V Kanagalingam (V K Lingam & Co) for the appellants.
RR Sethu (JC Leong & Saw) for the respondent.

Cur Adv Vult

Abu Mansor JCA (delivering judgment of the court): This is an appeal against the decision of the learned judge given on 28 June 1995, setting aside the award of the arbitrator of 15 December 1994. After hearing the arguments, we unanimously allowed the appeal on 24 November 1995 and restored the said arbitrator's award. The respondent appeals against our decision.

VK Lingam for the appellants/defendants (hereinafter called 'appellants') submitted that the appellants and the respondent (referred to as 'respondent') are brothers, the respondent being the eldest. To settle a pending proceeding between them, they signed an agreement dated 2 October 1993 (referred to as 'compromise agreement') which brought about a settlement ending the proceeding between the parties.

Counsel for the appellants submitted further that, when the parties attempted to bring into effect the compromise agreement, a dispute arose relating to the selection by each party of the companies listed in Sch 1. The appellants' solicitors had the dispute referred to the arbitrator, Dato' David Yeoh, named in the compromise agreement pursuant to cl 4.5 thereof.

At the arbitration, the respondent raised the point that the arbitrator could not proceed with the arbitration proceeding on the ground, so the respondent alleged, that the arbitrator had no jurisdiction to entertain the application. The arbitrator, however, dismissed the objection and proceeded to give his final award in favour of the appellants, which appears at pp 355–356 of the appeal record, the relevant parts of which are as in paras 1, 2 and 3 thereof as follows:

> The claimants and the respondent wish to proceed to arbitration and Dato' David Yeoh Eng Hock, the designated arbitrator within the meaning of cl 4.5, was appointed to adjudicate on the dispute.
>
> The claimants submitted their claim and their submission contained in a document dated 9 December 1994. The respondent submitted his defence and submission contained in a document dated 13 December 1994, the reply to the respondent's submission dated 14 December 1994, and I, as the arbitrator, have considered the aforesaid documents and the submissions contained therein.
>
> Now, I, Dato' David Yeoh Eng Hock, having been appointed arbitrator and having considered the claim, defence and reply to the submissions contained in the aforesaid documents, and having read all the documents put before me, do hereby make issue and publish this, my final award, which is as follows:
>
> (1) I am of the view that there is a dispute within the meaning of cl 4.5 of the compromise agreement to be referred to arbitration, and therefore, I have jurisdiction to adjudicate on this matter.
>
> (2) I award the following companies pursuant to cl 4.5 to the claimants:
>
> (a) Jaya Ternak Sdn Bhd;
>
> (b) Spektrum Megah (M) Sdn Bhd;

(c) Jiwa Suria Sdn Bhd; A

(d) Superior Manufacturing Co Sdn Bhd;

(e) Mundaring Enterprises Sdn Bhd; and

(3) I also award the building and Lots Nos 359/36, Jalan Pudu, Kuala Lumpur to the claimants.

The respondent was not satisfied with the arbitrator's award, of B course. The respondent filed a notice of motion R1–25–3–1995, praying to set aside the award of the arbitrator. The learned judge allowed the respondent's application on 28 June 1994, and set aside the arbitrator's award. As stated above, the appellants then appealed.

The learned judge, in allowing the motion of the respondent, gave a C written judgment in which he held the learned arbitrator had made mistakes and erred in several places, in particular, the correct interpretation of cl 4.2 thereof. We found it is necessary that we set down the relevant parts of the learned judge's judgment, to be found at pp 37–38 of the appeal record as follows:

D

8 After having studied this matter, I have found that the first issue in this application does, in actual fact, concern the correct interpretation of cl 4.2 of the said agreement of compromise because the source of this matter has been caused by the interpretation which is different from cl 4.2 of the said agreement of compromise by both parties. If the interpretation is in favour of the applicant, then the submission by the E applicant is correct and the same is true for the reverse.

9 In the context of the relevant cl 4.2, I am of the opinion that the choice of the companies as appendixed in the First Schedule of the said agreement of compromise has to be made in 'sequence'; firstly, with the applicant choosing the companies which he requires and afterwards, F by the three respondents. The words, 'the chosen companies' and 'the remaining companies', which are used in this clause, support this conclusion of mine. The proposition that the choice of the companies should have been made 'simultaneously' is not practicable. Also, to conclude that the three respondents should have the priority right to make the choice of the companies concerned will render the words, 'the G remaining companies' and 'the chosen companies', meaningless. The terms concerned had been used in the agreement of compromise and agreed upon by both parties who had been represented by their respective counsels. In view of the term 'the chosen companies', referring to the companies that had been chosen by the applicant, in its ordinary and logical meaning, means that the applicant is given the priority right to H make a choice to pick the relevant companies. Also, the term 'the remaining companies' bears the meaning that the remaining or other companies have to be taken by the three respondents. These words which are clear and straightforward in cl 4.2 have to be interpreted in their ordinary sense. As both parties have been represented by counsel at the time of signing of the said agreement of compromise, the question I that the said term of the said agreement is lopsided and unfair does not arise.

10 In the above premises, in weighing the decision of the arbitrator based on the interpretation which has been given above, it is clear that the

arbitrator had erred when making his decision which states the existence of a dispute as defined in cl 4.5. He should not have concluded which companies listed in the First Schedule should have been given to the parties as had been done in his 'final award'.

11. After having scrutinized the 'final award' concerned, I am of the opinion that the arbitrator, Dato' David Yeoh, has made a mistake in carrying his power under cl 4.5 of the said agreement of compromise. As such, I allow this application with costs.

The appellants' counsel submitted that the learned judge's finding is attacked on two grounds. First, the question of the interpretation of the compromise agreement, counsel contended, is the function of the arbitrator. The learned counsel in support cited Montague Smith J in *Thorburn v Barnes* (1867) Law Reports 2 CP 384 at p 404:

> I am of the same opinion. In answer to this action, the defendant relies upon an award; and he is entitled to succeed unless either of the objections urged against that award is well founded. The first objection urged is, that a dispute as to the true construction of the contract is not such a 'dispute arising out of the contract' as was intended by the parties to be submitted to arbitration. It seems to me, however, that such a dispute is entirely within the limits of the submission. It was impossible for the arbitrators to arrive at any conclusion as to the performance of the contract without first ascertaining what were its terms. I cannot for a moment conceive that the parties to this contract did not intend that the arbitrators should settle the whole matter; and I think no persons could be more fit to say what the rules meant than those who framed them, and that it would be most unfortunate if the court were to come to a different conclusion.

The appellants' counsel then referred us to *Bank Mellat v GAA Development & Construction Co* [1988] 2 Lloyd's Law Reports 44 at pp 53–54 where Steyn J held:

> ... The proper interpretation of all clauses in a contract, whether spelling out primary rights and obligations, exceptions to liability for limitations of liability, are matters falling within the jurisdiction of an arbitrator. A mistake made by an arbitrator as to the construction of any such clause in a contract cannot amount to an excess of jurisdiction. And that is so whether the proper law of the contract is English law or foreign law. If that is so, why should a mistake as to the applicability of a contractual remedy (which is not excluded by the lex fori, the arbitration agreement or the terms of reference) amount to an excess of jurisdiction? ... If one puts on one side the arbitration clause itself, which is in a special position because it is the source of the arbitrator's power, it seems to me that the arbitrator's authority extends to the interpretation of all clauses in the contract. In characteristically terse terms, Lord Justice Scrutton once said:
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> > ... if the arbitrator whom you choose makes a mistake in law that is your lookout for choosing the wrong arbitrator; *if you choose to go to Caesar you must take Caesar's judgment* ... [*African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd* at p 114.]

The appellants' counsel, continuing his submission, referred us to the several clauses of the compromise agreement, in particular cl 3.1(c),

relating to a transfer of a piece of land to the respondent; cl 3.1(d) relating also to a transfer of land to the respondent in Kelana Jaya; and cl 3.2, relating to the transfer of property in London; all these presenting no difficulty whatsoever as there were finality. The appellants' counsel submitted, however, the implementation of cl 4 of the compromise agreement, regarding the choice of other companies, brought about disagreement and consequently, as referred to above, the appellants had to refer the dispute to the arbitrator named in the said compromise agreement.

It may be convenient at this stage if we were to set down here the relevant cl 4 and cl 4.5 of the compromise agreement. They are:

> 4. Choice of other companies by TT Leng and the transferors
>
> 4.1 Within two (2) weeks from the date hereof, the parties shall appoint an independent firm of accountants and an independent firm of valuers which are to be mutually agreed upon by the parties to determine the value of the assets and liabilities of the other companies. The decision of such accountants and valuers shall be final and conclusive and shall not be challenged by any of the parties.
>
> 4.2 Within one (1) month of the valuations referred to in cl 4.1 being completed and received by the parties, TT Leng shall notify the transferors of those of the other companies ('the chosen companies') in respect of which he requires the transferors to transfer to him all of the issued and fully paid shares in the capital thereof which are not registered in the name of TT Leng ('the chosen shares'), and the transferors shall notify TT Leng of those of the other companies ('the remaining companies') in respect of which they require TT Leng to transfer to them all of the issued and fully paid shares in the capital thereof which are registered in the name of TT Leng ('the remaining shares'), and forthwith upon such notification being made by the parties (subject to there being no dispute relating thereto which shall be resolved pursuant to cl 4.5), the parties shall exchange the relevant definitive share certificates together with duly executed and registrable transfers thereof.
>
> 4.3)
>
>) Not relevant.
>
> 4.4)
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> 4.5 If there is any dispute under this cl 4 between the parties in any manner whatsoever, the parties shall refer such dispute to Dato' David Yeoh Eng Hock, whose decision shall be final and binding and shall not be challenged by any party.

It is common ground that 'other companies' are companies No 1–13 appearing in Sch 1.

The appellants' counsel submitted that the second ground of attack of the learned judge's judgment was that, the learned judge erred when he failed to give effect to the crucial words of cl 4.2 of the compromise agreement, which were, '(subject to there being no dispute relating thereto which shall be resolved pursuant to cl 4.5)', which was by reference to Dato' David Teoh, whose decision shall be final. What had transpired here

was that, both sides happened to choose some companies which happened to be the same. Hence, there was a dispute between them. In accordance with the agreement, the matter was referred to the named arbitrator.

As mentioned, the arbitrator proceeded to give his award at p 354 of the appeal record. He held that there was a dispute and he acted in accordance with cl 4.5 of the compromise agreement and gave his final award.

The appellants' counsel submitted further that, once the arbitrator had given his interpretation, it was not the court's function to substitute that interpretation. He submitted that, by way of test whether the arbitrator had the jurisdiction to determine the dispute is to ask the question whether the parties can rely and fall on the compromise agreement for the purpose of determining their dispute. If the answer is in the positive, both parties can rely on the compromise agreement and the arbitrator has jurisdiction to arbitrate.

Mr RR Sethu, counsel for the respondent, submitted on three grounds but of the three, the most substantive, in our view, was the respondent's allegation that the arbitrator had no jurisdiction to arbitrate. As regards the other two grounds that the matters raised by the appellants before us were not raised in the court below, and that the Pudu land Lot 359/361 was not to be included in the arbitration, did not go far to persuade us that arbitrator's award should not be considered. We are satisfied that, before the commencement of arbitration, there were letters between the parties to include the Pudu land in the arbitration. There was, therefore, submission to arbitration.

Another reason why Mr Sethu submitted the arbitrator had no jurisdiction to arbitrate was that, it was the appellants who invoked the arbitration clause, and the respondent did not do so.

Mr Sethu was at pains to point out to us that, at the hearing of the motion before the learned judge (see p 79 of the appeal record), the respondent's counsel duly submitted that the arbitrator had no jurisdiction to arbitrate.

The respondent's counsel also submitted before the learned judge that, although they attended and submitted before the arbitrator, that itself did not amount to a waiver or estoppel. The respondent's counsel said, before the arbitrator, in para 1 of his submission entitled 'Defence and Submission of the Respondent' (see p 333 of the appeal record), he similarly submitted:

> 1 The respondent contends that there is no dispute within the meaning of cl 4.5 of the compromise agreement to be referred to the arbitrator and the respondent therefore contends that the arbitrator has no jurisdiction to adjudicate on this matter.

Lastly, the respondent's counsel submitted that, at p 349 of the appeal record, in the respondent's solicitor's letter to the arbitrator dated 13 December 1994, the respondent's solicitors wrote:

> We are of the view that the preliminary issue as to your jurisdiction to arbitrate ought to be decided first, before the merits of the case are considered. *In this regard, we are willing to submit further on the preliminary issue if you deem it necessary.* (Emphasis is ours.)

As we have stated without the benefit of hearing further submission, the arbitrator proceeded to hand down his award on 15 December 1994.

The respondent's counsel in this argument submitted a number of authorities, the effect of which was, the court has the power to examine the question of jurisdiction of the arbitrator. He cited the Privy Council case of *AG for Manitoba v Kelly & Ors* [1922] 1 AC 268 at pp 275–276, where Lord Parmoor wrote:

> The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document, which cannot be explained, and much less varied, by extrinsic evidence, of subsequent facts or events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by showing the surrounding conditions when the agreement was made, none of the evidence adduced before Curran J is admissible or should have been admitted in determining the extent or limitations of the umpire's authority. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the court and not with the umpire: *Produce Brokers Co v Olympia Oil and Cake Co* [1916] 1 AC 314. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal have adopted a narrower construction than Curran J and Cameron JA.

Mr Sethu urged on us to look closely at cl 4.2 of the compromise agreement, at p 296 of the appeal record. He submitted that the way that clause should be read and implemented is simply that, TT Leng shall notify the other side, the transferors, the list of companies appearing in Sch 1 that he wanted the shares transferred to him, and the other side could do the transfer, and the transferors shall notify TT Leng of the shares of companies they want TT Leng to transfer to them, which must not be the same companies already chosen by TT Leng. According to Mr Sethu, this is the most reasonable way of interpreting this clause.

We were unanimous in our view that, were we to agree to Mr Sethu's construction, we would not be reading and implementing the clause in the spirit of the compromise agreement. We find merit in the argument of the appellants' counsel that, if we were to read cl 4.2 of the compromise agreement in the way Mr Sethu asked us to, we would have to ignore, the most important of all, the qualifications to the choice of companies being made which clause we have referred to above is:

A (Subject to there being no dispute relating thereto which shall be resolved pursuant to cl 4.5).

It is our decided opinion that the words 'relating thereto' cannot admit of any other construction other than relating to the choices of companies being made. For the resolution of any dispute whatsoever, cl 4.5 thereof
B provides:

> 4.5 If there is any dispute under this cl 4 between the parties *in any manner whatsoever*, the parties shall refer such dispute to Dato' David Yeoh Eng Hock, whose decision shall be final and binding and shall not be challenged by any party.

C We also uphold the submission of counsel for the appellants that, if the compromise agreement is looked at in its entirety, there is finality in all clauses; except that cl 4.2 is to be read with cl 4.5. It can be gathered that the parties were quite clear, and that they were fully aware and had anticipated that there could be disputes in their implementation of that
D clause. They therefore provided for its resolution of that eventuality in cl 4.5, and in the event of dispute surfacing, they shall go to a named arbitrator whose decision shall be final. We apply the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 at p 313, where Hashim Yeop Sani CJ, approving the case of *Gujarat State Co-operative Land Development Ltd v PR Mankad & Anor* AIR 1979
E SC 1203 held 'dispute' to be:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

The panel was unanimous in holding that cl 4.2 read with cl 4.5 of the said
F compromise agreement are all too clear to admit of any ambiguity that in the event that there exists a dispute between the parties requiring a resolution, then the parties shall resort to cl 4.2 thereof.

The panel also noted the overwhelming evidence in this case that there was submission of this dispute to the named arbitrator. The
G respondent's objection to the arbitrator's exercise of his jurisdiction was, to say the least, feeble. We say that the respondent had, by conduct, submitted to the jurisdiction of the arbitrator by making submissions before him. The letter of protest dated 13 December 1994 (see pp 349–350 of the appeal record) was written to the arbitrator personally and
H directly, without even so much as extending a copy to the appellants for them to respond. It was only sent after the respondent had made the submissions. One would have expected the respondent to be more vigorous and vociferous in his objection by applying for a stay and seeking a direction of the High Court as to the proper future course the arbitration proceedings before him would take, but, as stated at p 349 of the appeal
I record, the respondent only wrote to the arbitrator, stating that, 'We are willing to submit further if you deem it necessary'. At that time, both parties have already, by their conduct, agreed to give only written submissions, and the arbitrator was to rely on those and no oral evidence be given.

As to the correctness of the action taken by the arbitrator in deciding the question of his own jurisdiction himself, the appellants' counsel referred us to *The Law and Practice of Commercial Arbitration in England* (2nd Ed) by Sir Michael J Mustill and Stewart C Boyd at p 290 (see 288 IAP):

> The arbitrator should take care, however, not to carry his enquiries into his jurisdiction too far. He should confine himself to the more obvious objections. Anything of a more recondite nature should be left for the parties to raise.

If a question is raised on the jurisdiction of the arbitrator, either by a party or by the arbitrator himself, and if objection is pressed, the arbitrator should see whether the parties will themselves take steps to obtain a final ruling on the question of jurisdiction – by seeking declaratory relief, or by empowering him to decided the matter himself, or to state a case a upon it.

If the parties remain inactive, the arbitrator can choose between these two procedures, ie either:

1 to decide the question of jurisdiction himself, subsequently continuing or abandoning the arbitration according to what he decides; or

2 to set the question of jurisdiction on one side, leaving the parties to raise it in court, either before or after the award has been published.

Which course the arbitrator should adopt will depend on the circumstances. If the objection is straightforward, he may consider it better to rule at once, always bearing in mind that if either party is dissatisfied, the matter can be reopened by the court. On the other hand, if the question of jurisdiction is difficult, or if the hearing on the merits is unlikely to be expensive, so that even a null award will not involve a great waste of costs, the arbitrator may think it better to proceed with the reference, warning the claimant that he goes ahead at his peril.

It not infrequently happens that a party who objects root and branch to the jurisdiction of the arbitrator declines to take any part in the proceedings at all.

As we have stated, the learned arbitrator, on the face of the apparent submission of the respondent, ruled that there was a dispute; he held that he had jurisdiction and he made his final award. We have also held that we agree with the learned arbitrator that, giving a clear meaning to cl 4.2 of the compromise agreement and reading it with cl 4.5, it is beyond doubt that there was a dispute requiring a resolution in accordance with cl 4.5 thereof. In the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309, it was held by the Supreme Court at p 309:

> (1) Once it is established that there has arisen a dispute or difference or question, as provided in the arbitration agreement, the language of s 6 of the Arbitration Act 1950 places on the plaintiff the burden to show that it ought not to be referred to arbitration.

When we examine the whole conduct of the respondent, there was clearly failure on the part of the respondent, to apply for a stay of the arbitration,

A or to submit or to state a case of absence of jurisdiction before the learned judge, not merely making general submissions that the arbitrator had no such jurisdiction. If the respondent had done so, he would have discharged the burden on him, in the face of the invoking of cl 4.2 by the appellants that in their view this matter or dispute ought to be referred to arbitration. As stated, when the respondent complained to the arbitrator regarding his B jurisdiction, the letter was not even copied to the appellants.

Finally, we are unanimous that the learned judge had erred in not making a positive ruling in his judgment that the arbitrator had or had no jurisdiction. At p 37 of the appeal record, the learned judge impliedly held that there existed a dispute between the parties. The learned judge, we C think, on the face of the appellants invoking the arbitration clause, was bound to correctly apply the *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd*'s case; by which authority he is clearly bound. He was obliged to pose to the respondent the question and to require the respondent to discharge that burden as to why the matter should not be D referred to arbitration. We think the respondent's failure to adequately respond, and to properly challenge the appellants' claim that the arbitrator had jurisdiction to arbitrate, prejudiced the appellants and prevented them from contesting that important issue of jurisdiction.

We also hold that the learned judge erred when he failed to decide E and clearly answer the respondent on the issue of jurisdiction. We are unanimously of the view that, if the learned judge had applied his attention to the question of whether the arbitrator had jurisdiction, in all probability, taking all the circumstances into account, his answer would be that the arbitrator had been conferred with jurisdiction to arbitrate and that issue was not for him. We again referred to the same textbook, *The Law and* F *Practice of Commercial Arbitration in England.* Even assuming the parties were initially not in a position of any dispute, there can be reference to an arbitrator by the conduct of the parties, for the author at p 125 says:

> (c) Disputes arising after appointment of arbitrator
>
> A second consequence of the general rule that only disputes may be the G subject of arbitration is that the arbitrator has no jurisdiction over disputes which were not in existence when he was appointed to act. The appointment defines his jurisdiction at the same time as creating it, and cannot be taken to give him jurisdiction over something which does not that time exist. A dispute may be created after arbitration has commenced, either by the defendant for the first time raising a defence to the claim, or by the claimant H introducing a new claim into an existing dispute. The first situation raises no practical problems. Initially, the arbitrator has, in strict law, no jurisdiction over the undisputed claim. *But the conduct of the parties combines to give him jurisdiction: the claimant by bringing the claim before him, and the respondent by raising a defence to it in the arbitration. The arbitrator can therefore properly entertain both the claim and the defence.* (Emphasis added.)

I Lastly, having anxiously considered this appeal, we are unanimous in our view that the learned judge had erred in usurping the function of the arbitrator in the absence of any error of law on the face of the award. In *Pearl Hill Sdn Bhd v Trikkon Construction Sdn Bhd* [1984] 2 CLJ 191,

Mohd Dzaiddin J (as he then was), dismissing an application that the award of the arbitrator therein be remitted for reconsideration, held, after his examination, thus:

> (2) In the circumstances, therefore, the applicant had not shown to the satisfaction of the court that the award was bad on the face of it. There was nothing whatsoever on the face of the award indicating any error of law on the part of the arbitrator.

Likewise, we unanimously hold that the dispute was properly before the arbitrator by consent, and that there is absence of any error of law by the arbitrator on the face of it. It is trite law that it is the duty of the learned judge to preserve the award unless there was an error of law on the face of it. We fail to find any. It was an award given by an arbitrator agreed to by both parties to a compromise agreement. Both agreed that, that particular cl 4.2 dispute, if any, would be resolved by a named arbitrator whose decision shall be final. Clearly, there was a dispute and one party brought the dispute before the named arbitrator. No court would or should allow the other party to renege on it. The other party must be bound by the decision of the arbitrator as he had agreed to be so bound.

If the respondent had been so bold as to apply for a stay, we are confident he would have been opposed and met by a judgment such as the judgment of Edgar Joseph Jr SCJ (now FCJ) in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, where at p 112 he stated:

> It is well known that if a party can satisfy the court that the conditions for the grant of stay under s 6 of the [Arbitration] Act are satisfied, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, as the judge rightly recognized, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Harding* [1859] 28 LJ Ex 215, 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so'.

We therefore set aside the judgment of the learned judge for reasons given in this judgment, and hereby restored the award of the arbitrator with costs here and below.

Order accordingly.

Reported by Choo Siew Ling